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SENATE BILL 2825 By
Ramsey

HOUSE BILL 3135
By Chumney

AN ACT to encourage the development of brownfields properties without compromising environmental standards and to amend Tennessee Code Annotated, Title 68, Chapter 212, Part 2.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. This act may be cited as The Brownfields Property Reuse Act of 1999.

SECTION 2. Part 2 of Chapter 212 of Title 68 is amended by adding sections 3 through 9 below as appropriately designated new sections. Section 3. Definitions.

(a) As used in this Act, unless a different meaning is required by the context:

(1) An "affiliate" of, or a person "affiliated" with, a specified person, is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.

(2) "Brownfields agreement" means an agreement between the Department and a prospective developer that meets the requirements of section 4 of this Act.

(3) "Brownfields property" or "brownfields site" means abandoned, idled, or underused property at which expansion or redevelopment is hindered by actual environmental contamination or the possibility of environmental contamination and that

is or may be subject to remediation under any state remedial program other than the Petroleum Underground Storage Tank Act, T.C.A. §§68-215-101 et seq.

(4) "Current standards" when used in connection with "cleanup", "remediated", or "remediation" means that cleanup or remediation of contamination complies with generally applicable standards, guidance, or established methods governing the regulated substances that are established by statute or rule of a Board attached to the Department or adopted, published, or implemented by the Department.

(5) "Environmental contamination" or "contamination" means the presence of regulated substances at the property requiring remediation and that are to be remediated under the brownfields agreement.

(6) "Local government" means a municipality or county.

(7) A "parent" of a specified person is an affiliate controlling such person directly, or indirectly through one or more intermediaries.

(8) "Potentially liable party" means a person who is or may be liable for remediation under a remedial program.

(9) "Prospective developer" means any person who desires to either buy or sell a brownfields property for the purpose of developing or redeveloping that brownfields property and who is not a liable party, as defined in subsections (B) (C) or (D) of §68-212-202(3), for the brownfields property and is not a parent, subsidiary, or affiliate of such a liable party.

(10) "Regulated substance" means a hazardous substance, petroleum, or other substance regulated by a remedial program of the Department that is released into the environment.

(11) "Remedial program" means a program implemented by the Department for the remediation of any regulated substance.

(12) "Remediation" means action to clean up, mitigate, correct, abate, minimize, eliminate, control, or prevent the spreading, migration, leaking, leaching, volatilization, spilling, transport, or further release of a regulated substance into the environment in order to protect public health or the environment.

(13) A "subsidiary" of a specified person is an affiliate controlled by such person directly, or indirectly through one or more intermediaries.

SECTION 4. Brownfields agreement.

(a) The Commissioner may, in his discretion, enter into a brownfields agreement with a prospective developer who satisfies the requirements of this section. By doing this a developer may gain the benefit of the liability protection described in section 5 and a less expensive clean up that may result because of the lessened level of risk to the public and the environment at the site resulting from any agreed land use restrictions placed on the property. A prospective developer shall provide the Commissioner with any information necessary to demonstrate that:

(1) the prospective developer and any parent, subsidiary, or other affiliate of the prospective developer have fully informed the Commissioner of the regulatory history of the site and substantially complied with:

(A) the terms of any brownfields agreement or similar agreement to which the prospective developer or any parent, subsidiary, or other affiliate of the prospective developer has been a party;

(B) the requirements applicable to any remediation in which the applicant has previously engaged; and

(C) federal and state laws, regulations, and rules for the protection of the environment;

(2) as a result of the implementation of the brownfields agreement, the brownfields property will be suitable for the land uses specified in the agreement while fully protecting public health;

(3) there is a significant public benefit to the local community from the brownfields redevelopment;

(4) the prospective developer has or can obtain the financial, managerial, and technical means to fully implement the brownfields agreement and assure the safe use of the brownfields property;

(5) the prospective developer has complied with or will comply with **all applicable** procedural requirements; and

(6) any information necessary to make the determinations required by subsection (c) of this section.

(b) In negotiating a brownfields agreement, parties may rely on land use restrictions that will be included in a Notice of Land Use Restrictions required under section 7 of this Act. A brownfields agreement may provide for remediation standards that are based on those land use restrictions.

(c) A brownfields agreement shall contain a description of the brownfields property that would be sufficient as a description of the property in an instrument of conveyance and, as determined by the Commissioner, including but not limited to, a statement of:

(1) any remediation to be conducted on the property, including:

(A) a description of specific areas where remediation is to be conducted;

(B) the remediation method or methods to be employed;

(C) the resources that the prospective developer will make available;

(D) a schedule of remediation activities;
(E) applicable remediation standards;
(F) a schedule and the method or methods for evaluating the remediation; and

(G) a statement of the risk posed by the brownfields property to the public health, the environment, and the surrounding area with and without the proposed development and any associated land use restrictions;

(2) any land use restrictions that will apply to the brownfields property;

(3) the desired results of any remediation or land use restrictions with respect to the brownfields property;

(4) the guidelines, including parameters, principles, and policies within which the desired results are to be accomplished;

(5) the consequences of achieving or not achieving the desired results;
and

(6) any requirements for long term monitoring, operation, maintenance, or reporting.

(d) The prospective developer shall submit a post remediation report detailing the remediation performed and the post remediation risk to the public health and the environment.

(e) Any failure of the prospective developer or the prospective developer's agents and employees to comply with the brownfields agreement may result in a loss of the liability protection provided the prospective developer by section 5 of this Act.

SECTION 5. Liability protection.

(a) A prospective developer who enters into a brownfields agreement with the Commissioner and who is complying with the brownfields agreement shall only be held

liable for remediation of areas of regulated substances identified in the brownfields agreement to the extent stated in that agreement, except as provided in subsection (c) of this section. The liability protection provided under this Act applies to all of the following persons to the same extent as to a prospective developer, so long as these persons are not otherwise potentially liable parties or parents, subsidiaries, or affiliates of potentially liable parties and they are not required to undertake additional remediation to current standards pursuant to subsection (c) of this section:

(1) Any person under the direction or control of the prospective developer who directs or contracts for remediation or redevelopment of the brownfields property;

(2) Any future owner of the brownfields property;

(3) A person who develops or occupies the brownfields property;

(4) A successor or assign of any person to whom the liability protection provided under this Act applies; and

(5) Any lender or fiduciary that provides financing for remediation or redevelopment of the brownfields property.

(b) A person who conducts an environmental assessment or transaction screen on a brownfields property and who is not otherwise a liable party is not a **liable party as a** result of conducting the environmental assessment or transaction screen unless that person increases the risk of harm to public health or the environment by failing to exercise due diligence and reasonable care in performing the environmental assessment or transaction screen. A prospective developer who changes, or proposes to change, the use of the property after the filing of a Notice of Land Use Restrictions shall notify the Commissioner of said change in use.

(c) If a land use restriction set out in the Notice of Land Use Restrictions required under Section 7 is violated, the owner of the brownfields property at the time the land

use restriction is violated, the owner's successors and assigns, and the owner's agents who direct or contract for alteration of the brownfields property in violation of a land use restriction shall be liable for remediation to current standards. A prospective developer who completes the remediation or redevelopment required under a brownfields agreement or other person who receives liability protection under this Act shall not be required to undertake additional remediation at the brownfields property unless any of the events described in the following subsections apply.

(1) The Commissioner determines that the prospective developer knowingly or recklessly provided false information that was a basis for the brownfields agreement or that was offered to demonstrate compliance with the brownfields agreement or knowingly failed to disclose relevant information about regulated substances at the brownfields property.

(2) New information indicates the existence of previously unreported regulated substances or an area of previously unreported regulated substances on or associated with the brownfields property that has not been remediated to current standards, unless the brownfields agreement is amended to include any previously unreported regulated substances and any additional areas of contamination. If the brownfields agreement sets maximum concentrations for regulated substances, and new information indicates the existence of previously unreported areas of these regulated substances, further remediation shall be required only if the Commissioner determines that the areas of previously unreported regulated substances raise the risk of the regulated substances to public health or the environment to a level less protective of public health or the environment than that required by the brownfields agreement.

(3) The Commissioner determines that the level of risk to public health or the environment from regulated substances is unacceptable at or in the vicinity of the brownfields property due to changes in exposure conditions, including:

(I) a change in land use of the brownfields property or in its vicinity that increases the probability of exposure to regulated substances; or

(ii) the failure of remediation to mitigate risks to the extent required to make the brownfields property fully protective of public health and the environment as planned in the brownfields agreement.

(4) The Commissioner determines the risk to public health or the environment associated with the brownfields property is raised beyond an acceptable range and in a manner or to a degree not anticipated in the brownfields agreement because of new information about a regulated substance associated with the brownfields property or exposures at or around the brownfields property.

(5) The Commissioner determines that a person's use, or change in use, of the brownfields property causes an unacceptable risk to public health or the environment, in which case the person may be required by the Commissioner to undertake additional remediation measures under the provisions of this Act.

(6) A prospective developer fails to file a timely and proper Notice of Intent to Redevelop a Brownfields Property or Notice of Land Use Restrictions under this Act.

6. Public notice and community involvement for brownfields.

(a) A prospective developer who desires to enter into a brownfields agreement shall notify the public and the community in which the brownfields property is located of planned remediation and redevelopment activities. The prospective developer shall submit a Notice of Intent to Redevelop a Brownfields Property and a summary of the

Notice of Intent to the Commissioner. The Notice of Intent shall provide, to the extent known:

- (1) a legal description of the location of the brownfields property and a map showing the location of the brownfields property;
- (2) a description of the regulated substances involved and their concentrations in the media of the brownfields property;
- (3) a description of the intended future use of the brownfields property;
- (4) any proposed investigation and remediation; and
- (5) any proposed Notice of Land Use Restrictions prepared in accordance with section 7.

Both the Notice of Intent and the summary of the Notice of Intent shall state where the proposed brownfields agreement may be reviewed and the time period and means for submitting written comment and for requesting a public meeting on the proposed brownfields agreement. The summary of the Notice of Intent shall include a statement as to the public availability of the full Notice of Intent. After approval of the Notice of Intent and summary of the Notice of Intent by the Commissioner, the prospective developer shall provide a copy of the Notice of Intent to all local governments having jurisdiction over the brownfields property and within a five mile radius of the property. The prospective developer shall publish the summary of the Notice of Intent in a newspaper of general circulation serving the area in which the brownfields property is located. If required by the Commissioner, the prospective developer shall establish an information repository at a location in the local community. The prospective developer shall also conspicuously post a copy of the summary of the Notice of Intent at the brownfields site.

(b) The publication in a newspaper of general circulation shall begin a public comment period of 30 days. During the public comment period, members of the public,

residents of the community in which the brownfields property is located, and local governments having jurisdiction over the brownfields property or within a five mile radius of the property may submit comments to the Commissioner on the proposed brownfields agreement, including but not limited to, methods and degree of remediation, future land uses, and impact on local employment. The Commissioner may, upon request or for other good cause, extend this public comment period.

(c) Any person who desires a public meeting on a proposed brownfields agreement shall submit a written request for a public meeting to the Commissioner during the public comment period. The Commissioner shall consider all requests for a public meeting and shall hold a public meeting if he determines that there is significant public interest in the proposed brownfields agreement. If the Commissioner decides to hold a public meeting, the Commissioner shall, at least 30 days prior to the public meeting, mail written notice of the public meeting to all persons who requested the public meeting and to any other person who had previously requested notice. The Commissioner shall also direct the prospective developer to publish, at least 30 days prior to the date of the public meeting, a notice of the public meeting at least one time in a newspaper having general circulation in all counties within a five mile radius of the brownfields property. In any county in which there is more than one newspaper having general circulation, the Commissioner shall direct the prospective developer to publish a copy of the notice in as many newspapers having general circulation in the vicinity as he determines to be necessary to assure that the notice is generally available throughout the vicinity. The Commissioner shall prescribe the form and content of the notice to be published. The prospective developer shall also conspicuously post a copy of the notice of the public meeting at the brownfields site. The Commissioner shall prescribe the procedures to be followed in the public meeting. The Commissioner shall take detailed minutes of the meeting. The minutes shall include any written comments, exhibits, or

documents presented at the meeting. The Commissioner may also, upon request or for other good cause, extend the period for receiving written comments after the meeting.

(d) Prior to entering into a brownfields agreement, the Commissioner shall take into account all comments received. The Commissioner shall consider the comments and incorporate them into the brownfields agreement as he deems appropriate. The Commissioner shall give particular consideration to written comment that is supported by valid scientific and technical information and analysis.

SECTION 7. Notice of Land Use Restrictions in Deed.

(a) In order to reduce or eliminate the risk to public health or the environment posed by a brownfields or other site the Commissioner may, as part of any remediation, containment, clean-up or closure carried out pursuant to this Chapter, file, or cause to be filed, a Notice of Land Use Restriction in the register of deeds office in the appropriate county(s). A Notice of Land Use Restrictions shall be entitled "Notice of Land Use Restrictions", and shall:

(1) include a survey plat of areas designated by the Commissioner that has been prepared and certified by a professional land surveyor;

(2) include a legal description of the subject property that would be sufficient as a description of the property in an instrument of conveyance;

(3) identify the location and dimensions of the areas of potential environmental concern with respect to surveyed, permanent benchmarks;

(4) identify the type, location, and quantity of regulated substances and regulated substances known to exist on the property;

(5) identify any restrictions on the current or future use of the brownfields property; and

(6) if applicable and if the owner's permission is obtained, identify other property that is necessary or useful to maintain the level of protection appropriate

for the designated current or future use of the property and that are designated in the brownfields agreement, if any.

These land use restrictions may apply to activities on, over, or under the land, including, but not limited to, use of groundwater, building, filling, grading, excavating, and mining. Where a property encompasses more than one parcel or tract of land, a composite map or plat showing all parcels or tracts may be recorded.

(b) After the Commissioner approves the Notice of Land Use Restrictions under subsection (a) of this section, a prospective developer, who enters into a brownfields agreement with the Department, or a liable party shall file a copy of the Notice of Land Use Restrictions in the register of deeds office in the county or counties in which the land is located. A prospective developer shall file the Notice of Land Use Restrictions within 15 days of the prospective developer's receipt of the Commissioner's approval of the notice or the prospective developer's entry into the brownfields agreement, whichever is later.

(c) The register of deeds shall record the notice and index it in the grantor index under the names of the owners of the land, and, if different, also under the name of any prospective developer conducting the redevelopment of the brownfields property.

(d) When a property subject to a Notice of Land Use Restrictions is sold, leased, conveyed, or transferred, the deed or other instrument of transfer shall contain in the description section, in no smaller type than that used in the body of the deed or instrument:

(1) a statement that the property has been classified as a brownfields or a hazardous substance site and, if appropriate, cleaned up under this part;

(2) a statement of the type and quantity of any regulated substances known or anticipated to be remaining on the property under the brownfields agreement or the remedial action; and

(3) any land use restrictions remaining on the property at the time of transfer.

(e) A Notice of Land Use Restrictions filed pursuant to this section may be amended or cancelled by the Commissioner if the hazards have changed or have been eliminated. If requested in writing by the owner of the land and if the Commissioner concurs with the request, the Commissioner shall send to the register of deeds of each county where the notice is recorded a statement that the hazards have changed or been eliminated. The Commissioner's statement shall contain the names of the owners of the land as shown in the notice and reference the plat book and page where the notice is recorded. The register of deeds shall record the Commissioner's statement in the deed books and index it on the grantor index in the names of the owners of the land as shown in the Notice of Land Use Restrictions and on the grantee index in the name "Commissioner of the Department of Environment and Conservation".

(f) Any land use restriction filed pursuant to this section shall be enforced by any owner of the land. Any land use restriction may also be enforced by the Commissioner through issuance of an Order or by means of a civil action, including one to obtain an injunction against present or threatened violations of the restriction. The Commissioner may enforce any land use restriction without first having exhausted any available administrative remedies. A land use restriction may also be enforced by any unit of local government having jurisdiction over any part of the subject property by means of a civil action without the unit of local government having first exhausted any available administrative remedy. A land use restriction may also be enforced by any person eligible for liability protection under this Act who may lose liability protection if the land use restriction is violated. A land use restriction shall not be declared unenforceable due to lack of privity of estate or contract, due to lack of benefit to particular land, or due to lack of any property interest in particular land. Any person who owns or leases a

property subject to a land use restriction under this section shall abide by the land use restriction.

(g) This section shall apply in lieu of the provisions of sections 68-212-209 and 68-212-12 for brownfields properties remediated under this Act, except that any lien already placed on a property prior to entering the brownfields program must be satisfied. For other sites for which a Notice of Land Use Restrictions is filed, sections 68-212-209 and 68-212-212 may apply in addition to this section.

SECTION 8. Construction of Act.

(a) This Act is not intended and shall not be construed to:

(1) affect the ability of local governments to regulate land use under any provision of the Tennessee Code (the use of the identified brownfields property and any land use restrictions in the brownfields agreement may not allow a use that is prohibited by local land use restrictions adopted under such other authority);

(2) amend, modify, repeal, or otherwise alter any provision of any remedial program or other provision of this Title relating to any existing authority of the Commissioner or to civil and criminal penalties or enforcement actions and remedies available to the Commissioner, except as may be provided in a brownfields agreement;

(3) prevent or impede the immediate response of the Commissioner or potentially liable party to an emergency that involves an imminent or actual release of a hazardous substance that threatens public health or the environment;

(4) relieve a person receiving liability protection under this Act from any liability for regulated substances later caused by that person on a brownfields property;

(5) affect the right of any person to seek any relief available against any party to the brownfields agreement who may have liability with respect to the brownfields property, except that this Act does limit the relief available against any party to a brownfields agreement with respect to remediation of the brownfields property as provided in section 5;

(6) affect the right of any person who may have liability with respect to the brownfields property to seek contribution from any other person who may have liability with respect to the brownfields property and who neither received nor has liability protection under this Act;

(7) prevent the State from enforcing specific numerical remediation standards, monitoring, or compliance requirements specifically required to be enforced by the federal government as a condition to receive program authorization, delegation, primacy, or federal funds;

(8) create a defense against the imposition of criminal and civil fines or penalties or administrative penalties otherwise authorized by law and imposed as the result of the illegal disposal of waste or for the pollution of the land, air, or waters of this State on a brownfields property; or

(9) relieve a person of any liability for failure to exercise due diligence and reasonable care in performing an environmental assessment or transaction screen.

(b) Notwithstanding the provisions of the Claims Commission Act, T.C.A. §§9-8-301 et seq. or any other provision of law waiving the sovereign immunity of the State, the State, its agencies, officers, employees, and agents shall be absolutely immune from any liability in any proceeding for any injury or claim arising from negotiating, entering, monitoring, or enforcing a brownfields agreement or a Notice of Land Use Restrictions under this Act or any other action implementing this Act.

(c) The Commissioner shall not enter into a brownfields agreement for a brownfields site that is identified by the United States Environmental Protection Agency as a national priority list site.

SECTION 9. Fees.

(a) The Commissioner shall collect a fee from all prospective developers who submit a proposed brownfields agreement for review by the Commissioner of five thousand dollars (\$5,000), however this fee shall be waived if the same party has paid the fee under T.C.A. §68-212-224 for the same property. Prospective developers shall also reimburse the oversight costs of the Department incurred in relation to the brownfields property.

(b) Fees received pursuant to this section shall be credited to a separate account within the Hazardous Waste Remedial Action Fund.

SECTION 10. Tennessee Code Annotated, Section 68-212-215(d) is amended by adding the following language, "or who is adversely affected by a decision by the Commissioner as to whether or not to enter into a brownfields agreement or by the terms of any brownfields agreement" after the words "is issued".

SECTION 11. This Act shall take effect upon becoming a law, the public welfare requiring it.